Supreme Court, U.S.
FILED

(1)

98 1490 MAR 14 1999

No.

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM J. HALL, BARBARA LISSER,
on behalf of themselves and all others similarly situated,

*Petitioners,*

*v.*

CORAM HEALTHCARE CORPORATION,
JAMES M. SWEENY, PATRICK FORTUNE
and SAM LENO,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

ROGER W. KIRBY
*Counsel of Record*
PETER S. LINDEN
KIRBY MCINERNEY & SQUIRE, LLP
830 Third Avenue
New York, New York 10022
(212) 317-2300

EDWARD A. GROSSMANN
PATRICIA S. GILLANE
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

W. PITTS CARR
RENDER C. FREEMAN
CARR, TABB & POPE
1355 Peachtree Street, N.E.
Suite 2000
Atlanta, Georgia 30309
(404) 876-7790

*Attorneys for Petitioners*

4PP

## QUESTION PRESENTED

In 1995, Petitioners and numerous other shareholders of T2 Medical Inc. settled a federal securities class action for cash and $25 million of securities in a successor company. The value of the securities plummeted almost immediately, and petitioners initiated a fresh claim, alleging that the value of the securities had been inflated by fraud. Shareholders not involved in the settlement who had purchased stock in the successor company in the open market at the same time petitioners obtained securities in the settlement, also initiated a lawsuit pursuant to the federal securities laws and subsequently obtained a settlement of approximately $40 million. The court below held that petitioners were barred from prosecuting their claim concerning the securities obtained in the settlement because, allegedly, language in the settlement agreement barred them from doing so. Assuming the court's interpretation of the settlement agreement to have been entirely correct, the effect of such ruling is directly contrary to § 29(a) of the Securities Exchange Act, 15 U.S.C. § 78cc(a) ("Exchange Act"). It provides that:

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

In dismissing all the claims asserted in this litigation, the court below held, *inter alia*, that § 29(a) was limited to instances where recission is sought, the court of appeals, without explanation, plainly violated the express language of 29(a), and established a precedent that will discourage the

resolution of any securities claim through the issuance of additional securities. Thus, the question on appeal is:

In holding that an agreement may effect a waiver of compliance with the Exchange Act, did the court below violate § 29(a)?

## STATEMENT OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES UNDER RULE 29.6

The petitioners are individual, natural persons.

The following are parent companies, subsidiaries and affiliates of Coram Healthcare Corporation which have issued shares to the public:

Coram Healthcare Corporation
Curaflex Health Systems, Inc.
H.M.S.S., Inc.
HealthInfusion, Inc.
Medisys, Inc.
$T^2$ Medical Inc.

## TABLE OF CONTENTS

QUESTION PRESENTED . . . . . i

STATEMENT OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES UNDER RULE 29.6 . . . . . iii

TABLE OF CONTENTS . . . . . iv

TABLE OF AUTHORITIES . . . . . vi

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

STATUTORY PROVISIONS INVOLVED . . . . . 1

STATEMENT OF THE FACTS . . . . . 2

REASONS FOR GRANTING THE WRIT . . . . . 8

ARGUMENT . . . . . 10

I. THE SETTLEMENT PROVISIONS COULD NOT BAR THE ASSERTION OF FEDERAL SECURITIES LAW CLAIMS . . . . . 10

A. Any Provision Purporting to Waive Petitioners' Claims Is Void . . . . . 10

B. The Decision Below Ignored the Directives of § 29(a) and This Court . . . 13

CONCLUSION . . . . . 15

## APPENDIX

Appendix A - Opinion of The United States Court of Appeals For The Eleventh Circuit In William J. Hall, et al., v. Coram Healthcare Corporation, et al., Dated And Decided October 15, 1998 . . . . . 1a

Appendix B - Order Of The United States District Court For The Northern District Of Georgia In William J. Hall, et al. v. Coram Healthcare Corporation, et al., Dated February 12, 1997 . . . . . 12a

Appendix C - Order of The United States Court of Appeals For The Eleventh Circuit In William J. Hall, et al., v. Coram Healthcare Corporation, et al., Dated And Decided December 14, 1998 . . . . . 25a

## TABLE OF AUTHORITIES

### CASES

*Childs v. RIC Group, Inc.*,
331 F. Supp. 1078 (N.D. Ga. 1970), *aff'd.*, 447 F.2d
1407 (5th Cir. 1971) ..... 12

*Doody v. E.F. Hutton & Co.*,
587 F. Supp. 829 (D. Minn. 1984) ..... 11

*Gannett Co., Inc. v. Register Publishing Co.*,
428 F. Supp. 818 (D. Conn 1977) ..... 14

*Goodman v. Epstein*,
582 F.2d 388 (7th Cir. 1978), *cert. denied*,
440 U.S. 939 (1979) ..... 12

*Hall v. Coram Healthcare Corp.*,
157 F.3d 1286 (11th Cir. 1998) ..... *passim*

*Harsco Corp. v. Segui*,
91 F.3d 337 (2d Cir. 1996) ..... 8
13
14

*In re Coram Healthcare Corp. Litigation*,
Master file No. 95-N-2074 (D. Co. 1995) ..... 4

*In the Matter of Linder, Bilotti & Co., Inc.*,
Release No. 7460, 42 SEC Decisions,
1964 SEC LEXIS 405 (November 13, 1964) . 11

*Meason v. Gilbert*,
236 Ga. 862, 226 S.E.2d 49 (1976) ..... 6
8
10
14

*Mullen v. New Jersey Steel Corp.*,
733 F. Supp. 1534 (D.N.J. 1990) ..... 12

*Rogen v. Ilikon Corp.*,
361 F.2d 260 (1st Cir. 1966) ..... 8
9
11

*Schine v. Schine*,
254 F. Supp. 986 (S.D.N.Y.),
*appeal dismissed*, 367 F.2d 685 (2d Cir. 1966) .... 8
11

*Shearson/American Express, Inc. v. McMahon*,
482 U.S. 220 (1987) ..... 6
9
10

*Special Transport Svcs. Inc. v. Balto*,
325 F. Supp. 1185 (D. Minn 1971) ..... 11

**STATUTES**

§ 14 of the Securities Act of 1933, ..... 8
15 U.S.C. § 77n 12

28 U.S.C. §1254 ..... 1

§ 29(a) of the Securities Exchange Act of 1934,
15 U.S.C. § 78cc(a) ..... passim

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William J. Hall and Barbara Lisser, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, see appendix ("App.) p. 1a-11a), is reported at 157 F.3d 1286 (11th Cir. 1998). The opinion of the district court is reprinted in the appendix (App. pp. 12a-24a).

## JURISDICTION

The court of appeals denied petitioners' petition for rehearing and suggestion for rehearing *en banc* and entered its judgment on December 14, 1998 (App. p. 25a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). A single petition is filed pursuant to this Court's Rule 12.4.

## STATUTORY PROVISIONS INVOLVED

The relevant text of § 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), is reprinted above at p. ii.

## STATEMENT OF THE FACTS

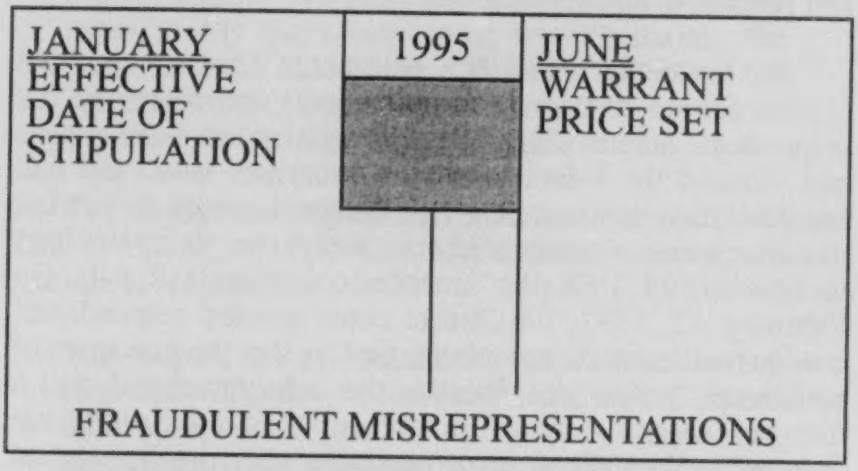
In 1992, petitioners and other shareholders of T2 Medical Inc. ("T2") commenced a class action against the officers and directors of T2, asserting violations of the federal securities laws. In July 1994, T2 merged with three other companies to create Coram Healthcare Corporation ("Coram"). In early 1995, the settlement of the litigation against T2 was presented to the district court and preliminarily approved. (R.3-12-3).[1] The stipulation of settlement was effectively entered into, and preliminarily approved, by the district court, on January 27, 1995, although it was actually executed in March, 1995. During the first week of March 1995, the petitioners on behalf of themselves and class members and respondents each executed a stipulation of settlement (R.1-5-16). The stipulation provided for the settlement of the action against T2 and its officers and directors and provided for a lump sum cash payment of $25 million and the issuance of warrants to purchase Coram common stock (R.2-8-Exhibit A-20-22).

The exercise price of the warrants was to be set nearly a half year after the settlement agreement was executed and was to be based on the performance of Coram's common stock for 10 trading days prior to the expiration of the time in which to appeal the final order and judgment dismissing the T2 Medical Litigation (R.1-5-16). The exercise price of the warrants would be set by a formula based on the market value of Coram common stock between June 5 and June 19, 1995, the "Formula Period" (R.1-5-17; 2-8, Ex. A, ¶ 2.3(c)). If the market value of Coram common stock had been inflated during the June 5-19, 1995 period, then the exercise prices of the warrants also would be inflated. It was during the

---

[1]References to the record below designate the record volume and docket entry number and, if appropriate, the relevant page or paragraph number.

Formula Period, the period between the effective date of the settlement and the June exercise pricing of the warrants, that the fraud occurred. This formula period was nearly six months after the settlement was executed. The following timeline makes this point even more clear.




The subject warrants created an option to purchase Coram common stock at $22.125 a share (the exercise price) for a period of five years. Exercise price is a key factor in determining the value of the warrants. Other factors held constant, the higher the exercise price, the lower the value of the warrant. If, as happened here, the price of the underlying common stock was artificially inflated, so would the exercise price of the warrants.

The complaint alleges that between the execution of the settlement agreement in March of 1995 and the establishment of the exercise price of the warrants in mid-June of that year, Coram had inflated the price of its common stock and warrants by misrepresentation of its financial condition. *See*, *e.g.*, R.1-5-3, 66, 87-96, 99; and timeline *supra*.

The settlement became final, and the warrant exercise price became set, on June 19, 1995, the last day of the

Formula Period. On August 11, 1995, the marketplace became aware that Coram had been engaged in an ongoing fraudulent scheme that had inflated the value of Coram common stock and the warrants' exercise price. Thereupon the values of both stock and warrants fell precipitously, and because of the limited life of the warrants, they were rendered and remain virtually worthless.[2]

On November 21, 1995, petitioners filed a complaint against Coram and certain of its officers and directors, the respondents herein. This action complained that defendants had violated the federal and state securities laws, and had breached their contract (R.1-1) in connection with the pricing of the warrants. An amended class action complaint was filed on February 28, 1996 (the "amended complaint") (R.1-5). On February 12, 1997, the district court granted respondents' motion to dismiss the complaint, finding that the gravamen of petitioners' action was fraud in the inducement and that a merger clause contained in the stipulation of settlement precluded plaintiffs from prosecuting their claim against Coram (App. p.12a-24a). Petitioners appealed from that decision. (R.3-25).[3]

---

[2] Within days, holders of Coram's common stock began a class action in the federal court in Colorado alleging violations of the federal securities laws for these misrepresentations. That action alleged that defendants had fraudulently inflated their financial results during the same time that appellants were negotiating the terms of the warrants through the date the exercise price of the warrants was set (R.3-12-4,5). It settled for approximately $44 million. *See*, *In re Coram Healthcare Corp. Litig.*, Master file No. 95-N-2074 (D. Co. 1995).

[3] Petitioners have asserted that even if the merger and waiver provisions expressly precluded petitioners' claims, as respondent alleged and the court concluded, the provisions would still be void under § 29(a)

(continued...)

The merger clause in the settlement stipulation (R.2-8, Ex. A, ¶ 10.7) provided:

> [The] Side Letter Agreement, Stipulation and the Exhibits attached hereto constitute the entire agreement among the parties hereto and no representations, warranties or inducements have been made to any party concerning the Stipulation, the Exhibits or the Side Letter Agreement other than the representations, warranties and covenants contained and memorialized in such documents.

The settlement stipulation included another provision (R.2-8, Ex. A, ¶ 9.7) that respondents asserted waived petitioners' rights:

> This Stipulation of Settlement, and each and every term and obligation of the Parties and their Counsel hereunder, shall not be subject to limitation, impairment, modification, or termination for any reason (except as expressly set forth herein), including without limitation the following:
>
> (a) Any judicial, legislative or other governmental action, decision or announcement of any type which allegedly relates to any of the terms of this settlement or to any issue, claim, allegation or defense which has been or might have been asserted in the Litigation;
>
> (b) Any change, whether adverse or positive, in the financial condition, assets,

---

[3](...continued)
of the Exchange Act.

liabilities, business, or any other corporate or personal activity of any of the Parties;

(c) Any allegedly newly discovered facts, legal issues, events or allegations of any type which allegedly relate to any of the terms of this settlement or to any Released Claim; or

(d) Any other action or conduct of any type which allegedly relates to any of the terms of this settlement or to any Released Claim.

The Eleventh Circuit affirmed the district court decision (App. p. 1a-11a), thereby ignoring relevant federal and state law, which forbid the enforcement of agreements that waive compliance with the federal securities laws. *See* 15 U.S.C. § 78cc(a), Securities Exchange Act, § 29(a); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987); *Meason v. Gilbert*, 236 Ga. 862, 226 S.E. 2d 49 (1976).

The court held that petitioners' claim was barred by the provisions of a stipulation of settlement in the *In re: T2 Medical Shareholders Litigation*. The court so held notwithstanding that both § 29(a) of the Exchange Act and state law void contract provisions that purport to waive compliance with federal or state law.[4]

---

[4] The Eleventh Circuit also misinterpreted the nature of petitioners' claim. This misinterpretation allowed the Court to reach an incorrect ruling of law. Thus, the Court found that during oral argument counsel stated "that the fraud occurred after the settlement was final" (App., p. 5a). That is not petitioners' claim. The fraud occurred after the time that the settlement agreement had been executed, not after the time

(continued...)

This petition seeks review of this holding.

---

[4](...continued)
the settlement became final, and before the exercise price had finally been set.

## REASONS FOR GRANTING THE WRIT

Congress has expressly voided any condition, stipulation or provision binding a person to waive compliance with the statutory provisions of the Securities Exchange Act of 1934 or the Securities Act of 1933, or with the rules or regulations thereunder. *See* 15 U.S.C. § 78 cc(a) (Securities Exchange Act, § 29(a), and 15 U.S.C. § 77n (Securities Act, § 14). Consistently, the courts have held that where a provision of an agreement between a seller and a purchaser of securities is executed simultaneously with, or as a part of, a contract for the sale of the securities, and the provision waives the purchasers' rights or releasing the seller from liability under the antifraud provisions of the federal securities laws, the provision is void. *See e.g., Rogen v. Ilikon Corp.*, 361 F.2d 260 (1st Cir. 1966); *Schine v. Schine*, 254 F. Supp. 986 (S.D.N.Y. 1966), *appeal dismissed*, 367 F. 2d 685 (2d Cir. 1966). State law is to the same effect. *See Meason v. Gilbert*, 236 Ga. 862 (1976).

The Eleventh Circuit ignored the imperatives of federal and state law. Although petitioners raised the § 29(a) argument, the Eleventh Circuit addressed the argument only obliquely through its discussion of *Meason v. Gilbert* and *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996). The court found that *Meason* held "to allow a purchaser to waive all violations of the Georgia Securities Act by contract would eviscerate the protections of that statute, and that such a waiver would be void and without effect." App., p. 10a. Nevertheless, without analysis, the Eleventh Circuit limited *Meason* and, *sub silencio,* § 29(a) to instances where recission was sought (App., pp. 9a-10a).

A writ of certiorari should be granted here because, the Eleventh Circuit has decided an important question of federal law in a way that conflicts with a statute of the United States and a relevant decision of this Court. Supreme Court Rule 10(c). *See Shearson/American Express, Inc. v. McMahon*,

482 U.S. 220, 228 (1987) ("what the antiwaiver provision of § 29(a) forbids is enforcement of agreements to waive 'compliance' with the provisions of the statute."). In addition, the Eleventh Circuit decision is in conflict with another United States court of appeals decision on the same important matter. Supreme Court Rule 10(a). *See Rogen v. Ilikon Corp.*, 361 F.2d 260 (1st Cir. 1966).

## ARGUMENT

### I. THE SETTLEMENT PROVISIONS COULD NOT BAR THE ASSERTION OF FEDERAL SECURITIES LAW CLAIMS.

#### A. Any Provision Purporting to Waive Petitioners' Claims Is Void

Section 29(a) of the Exchange Act voids "any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder". 15 U.S.C. § 78cc(a) 1997. Therefore, none of the provisions of the settlement stipulation can constitute a waiver of the federal securities laws. "What the antiwaiver provision of § 29(a) forbids is enforcement of agreements to waive 'compliance' with the provisions of the statute." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987). In other words, § 29(a) "prohibits waiver of the substantive obligations imposed by the Exchange Act." *Id.* Similarly, in *Meason v. Gilbert*, 236 Ga. 862, 226 S.E.2d 49 (1976), the Supreme Court of Georgia found unenforceable an integration clause in a stock purchase agreement that no representations other than those contained in the prospectus induced the purchaser to buy certain securities (App., p. 9a). Thus, even assuming *arguendo* that the settlement agreement contained a merger clause, under federal and state law, that clause could not trump the securities laws either of the United States or Georgia.

Consistent with *Shearson*, other federal courts have concluded that an agreement between a seller and a purchaser of securities that is executed as part of the contract of sale of the securities cannot waive the purchaser's rights, or release the seller from liability, under the antifraud provisions of the federal securities acts.

In *Rogen v. Ilikon Corp.*, 361 F.2d 260 (1st Cir. 1966), plaintiff sued under § 10(b) of the Securities Exchange Act, seeking to recover damages for nondisclosure of material facts in connection with plaintiff's sale of stock to the defendant corporation. In the contract for the sale of the stock, plaintiff acknowledged that he had conducted an investigation and that he was fully familiar with the business of the corporation. The district court granted defendant's motion for summary judgment. The First Circuit reversed, concluding that were it to hold the existence of the contractual acknowledgment of nonreliance constituted a basis for finding nonreliance as a matter of law, it would eviscerate § 29(a) of the Act. *See also Doody v. E.F. Hutton & Co.*, 587 F. Supp. 829 (D. Minn. 1984) (integration clause in stock subscription agreements, stating that no representations other than those contained in prospectus induced plaintiff to purchase securities, did not constitute waiver of rights under federal securities laws); *Special Transp. Svcs. Inc. v. Balto*, 325 F. Supp. 1185 (D. Minn 1971) (contract cannot waive statutory liabilities under federal securities laws, whether waiver is conscious or inadvertent); *Schine v. Schine*, 254 F. Supp. 986 (S.D.N.Y), *appeal dismissed*, 367 F.2d 685 (2d Cir. 1966).

"To the extent [a] provision. . . purported to bind any person to waive any rights he might have under the anti-fraud provisions. . . based on the oral or other misrepresentations, the provision is void" [*citing* § 14 of the Securities Act and § 29(a) of the Exchange Act].[5] *In the Matter of Linder, Bilotti & Co., Inc.*, 42 SEC Decisions, 1964 SEC LEXIS 405, *5 (November 13, 1964).

The waiver of federal fraud claims is especially troubling where, as here, the waived claims were unknown or not fully

---

[5] The SEC went so far as to recognize that the inclusion of such a provision might itself constitute a violation of the anti-fraud provisions *Id.*

matured at the time of waiver. *See Goodman v. Epstein*, 582 F.2d 388, 402 (7th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) ("a purported release of claims under the federal securities laws is valid *only* as to mature, ripened claims of which the releasing party had knowledge before signing the release"); *Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1547 (D.N.J. 1990); *Childs v. RIC Group, Inc.*, 331 F. Supp. 1078, 1083 (N.D. Ga. 1970), *aff'd.*, 447 F.2d 1407 (5th Cir. 1971) (party does not waive rights under the Exchange Act without actual knowledge).

Here, plaintiffs had no knowledge of the adverse information that Coram had purposefully concealed (R.1-5-[Am. Cmplt.] ¶¶ 4-6). Nor could plaintiffs have obtained such knowledge. That is the nature of fraud. At the time of execution of the stipulation, the fraudulent conduct artificially inflating the value of Coram stock and the warrants was continuing and undisclosed, and remained so until well after the end of the so-called Formula Period, almost seven months later (R.1-5-¶120).[6] Indeed, defendants made numerous falsely positive statements to the investing public concealing the true nature of Coram's business (R.1-5). Thus, plaintiffs were not on notice of the possibility of fraud. Nor could plaintiffs have uncovered this information. The litigation being settled involved the conduct of T2, Coram's predecessor during 1992 and 1993. An investigation of the fraud at issue would have meant an investigation of a business and time period that the earlier T2 litigation did not concern. It is unreasonable to expect plaintiffs to investigate the business of a stranger to the prior litigation -- Coram -- on the assumption that fraud was afoot. There is no suggestion that plaintiffs were put on notice inquiry.

---

[6] The Formula Period was the period during which pursuant to the terms of the stipulation the warrants exercise price was adjusted to correspond to additional movements in Coram's common stock price. R.1-5-17.

### B. The Decision Below Ignored the Directives of § 29(a) and This Court

The Eleventh Circuit rejected the application of § 29(a), improperly relying upon *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996). App., p. 10a. In *Harsco*, plaintiff corporation Harsco entered into a stock purchase agreement to purchase all of the outstanding stock of MultiServ. The stock purchase agreement contained fourteen pages of very specific representations concerning the business to be acquired, as well as a merger clause. After the sale, Harsco believed it had been misled as to various aspects of the company, and sued the officers and former shareholders of MultiServ. Among other things, Harsco asserted federal securities fraud violations.

The Second Circuit dismissed Harsco's claim, finding that the contract provisions eliminated the element of reasonable reliance, because the disclaimer and merger provisions defined the boundaries upon what plaintiff Harsco could rely. *Id.* at 345-48. However, the Second Circuit recognized that its holding was limited by the particular facts of the case, where the seller provided detailed representations. Thus, the Second Circuit concluded:

> Harsco has not waived its rights to bring any suit resulting from this deal.
>
> * * *
>
> In different circumstances (*e.g.*, if there were but one vague seller's representations) a no other representations clause might be toothless and run afoul of § 29(a).

*Id.* at 344. Thus, the very language of *Harsco* warns against the interpretation employed by the Eleventh Circuit. Here, the contract provided only vague representations, if any, concerning the price of the warrants. Moreover, plaintiffs could not be limited by the provisions of the agreement, because the fraud occurred between the date of the settlement agreement and the setting of the exercise price.

The Eleventh Circuit decision also erred in narrowing the reach of § 29(a), and the analogous Georgia law set forth in *Meason, supra*, to instances where the purchaser had sought rescission (App., pp. 9a-10). There is nothing in the federal statute, or in Georgia law for that matter, that permits such a limitation.

While a plaintiff may be foreclosed from seeking recission if (s)he does not seek it promptly, a plaintiff is entitled to seek damages. *See Gannett Co., Inc. v. Register Publishing Co.*, 428 F. Supp. 818, 841 (D. Conn 1977) (rejecting use of § 29(a) to obtain recission, but concluding that "nothing in this memorandum should be taken as reflecting any view on the amount of damages that could eventually be awarded. [I]f the frauds as alleged and the damages as claimed can be proven, a substantial recovery of compensatory and exemplary damages may be possible."). Besides, section 29(a) mandates that usual contract rules must yield to the federal securities laws. In sum, the decision below is directly contrary to the express language of an important federal statute.

## CONCLUSION

The petition for a writ of certiorari should be granted.

New York, New York
March 15, 1999

Respectfully submitted,

Roger W. Kirby
*Counsel of Record*
Peter S. Linden
Kirby McInerney
& Squire, LLP
830 Third Avenue
New York, NY 10022
(212) 317-2300

Attorneys for Petitioners

# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED OCTOBER 15, 1998**

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8246

D.C. Docket No. 1:95-CV-2994-WBH

WILLIAM J. HALL, BARBARA LISSER, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

versus

CORAM HEALTHCARE CORPORATION, JAMES M. SWEENEY, PATRICK FORTUNE, SAM LENO,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia.

**(October 15, 1998)**

Before EDMONDSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

*Appendix A*

CLARK, Senior Circuit Judge:

## BACKGROUND

A complete account of the facts in this case is set out in *In re T2 Medical, Inc. Shareholder Litigation* ("*In re T2*").[1] Briefly, the appellants here were the plaintiff class members of a prior federal securities action that had resulted in a settlement with the defendants from that action, Coram Healthcare Corporation ("Coram") and two officers from a company that had merged with Coram. As part of the settlement agreement, appellants were issued over 2.5 million warrants to purchase Coram common stock at approximately $22 per share.[2] Several months after the settlement was final, Coram announced a second-quarter loss of over 66 million dollars, leading to a significant decrease in the value of the warrants.[3] Appellants alleged that during the pendency of the settlement, the defendants publicly made false and misleading statements and omitted material facts that led to an inflated price of their stock, and that they misrepresented the true financial condition and performance of the company.

---

1. 130 F.3d 990 (11th Cir. 1997).

2. This price reflected an initial exercise price of $20.25 that was adjusted based on the average closing price for Coram common stock for the ten business days preceding the date on which the judgment became final.

3. The trading day following the announcement, the closing price of Coram common stock was $5.25 per share.

*Appendix A*

Appellants filed a Motion to Enforce Stipulation of Settlement, alleging numerous claims under Georgia law and requesting damages, or, in the alternative, reformation of the settlement agreement to adjust the price of the warrants.[4] The district court denied the motion, holding that it no longer retained authority or jurisdiction over the settlement.[5] The appellants appealed that decision, but this court affirmed the district court's denial of the motion for lack of jurisdiction.[6]

After filing their notice of appeal, the appellants filed this suit against Coram and several of its officers, asserting claims for violation of (1) section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act),[7] and Rule 10b-5;[8] (2) section 20(a) of the Exchange Act;[9] (3) state law claims of unlawful securities practices;[10] (4) state law claims of fraud by silence;[11] and (5) breach of the implied covenant of good faith and fair dealing. They sought compensatory

---

4. *See In re T2*, 130 F.3d at 993.

5. *Id.* at 993-94.

6. *Id.* at 995.

7. 15 U.S.C. § 78j(b).

8. 17 C.F.R. § 240.10b-5.

9. 15 U.S.C. § 78t(a).

10. O.C.G.A. § 10-5-12(a)(2).

11. O.C.G.A. § 51-6-4.

damages and an award of damages to reflect the difference in the value of the warrants from the price in the settlement and the closing price of Coram stock on the trading day following the announcement.

The district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6), finding that the settlement was a contract subject to the ordinary rules of contract construction, and that the settlement contained a merger or "entire agreement" clause. The district court relied on Georgia law holding that when the injured party sought damages rather than recission, a merger clause prevented recovery by estopping the claimant from asserting reliance on any misrepresentations or omissions made outside of the four corners of the contract. The district court found that because the plaintiffs specifically disavowed reliance on statements not included in the settlement documents, and could show no statements within the settlement documents by which they were defrauded, they failed to state a claim for securities fraud. Because the appellants could not recover any relief on their federal claims, and thus no federal jurisdiction existed, the district court dismissed the state law claims. This appeal followed.

## DISCUSSION

This Court reviews *de novo* the dismissal of a complaint for failure to state a claim, accepting all allegations in the complaint as true and construing facts in a light most favorable to the plaintiff.[12] A complaint may not be dismissed unless it appears beyond doubt that the plaintiff cannot prove

12. *Harper v. Thomas*, 988 F.2d 101, 103 (11th Cir. 1993).

any set of facts in support of his claim which would entitle him to relief.[13]

***Federal securities claims***

To state a cause of action under Section 10b of the Exchange Act or Rule 10b-5, plaintiffs must be able to demonstrate reliance on a material misrepresentation or omission made either directly or through fraud on the market.[14] In their complaint, the appellants alleged that the statements were made or omitted from "public statements, press releases and filings with the Securities and Exchange Commission."

Appellants argue that their claims are governed by federal securities law, not by state contract law, and that a merger clause is insufficient to bar a claim under the Exchange Act for securities fraud. During oral argument, counsel for the appellants specifically alleged that the fraud occurred after the district court's order finalizing the settlement, disavowed any claim of fraud in the inducement, and argued that because the fraud occurred after the settlement, it was not barred by the merger clause. However, the allegations of fraud in the complaint specifically and repeatedly state that the misstatements and omissions of fact comprising the fraud

---

13. *Pataula Elec. Membership Corp. v. Whitworth*, 951 F.2d 1238, 1240 (11th Cir. 1992), *cert. denied*, 506 U.S. 907, 113 S.Ct. 302, 121 L.Ed.2d 225 (1992).

14. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 243, 108 S.Ct. 978, 989, 99 L.Ed.2d 194 (1988) (emphasis added).

occurred "[p]rior to the final determination of the exercise price of the Warrants."

The problem with the argument that the fraud occurred after the settlement was final is that appellants have failed to show the reliance necessary to state a cause of action for a federal securities fraud claim. Fraud occurring after the settlement would be irrelevant to any stock purchased by the appellants through the exercise of the warrants, because the warrants' price was fixed by the settlement. The price was arrived at through negotiation, and was not set by the market. Thus, in order to establish reliance, any claim for fraud that the appellants have necessarily would have had to occur by the time the settlement was made final.

Paragraph 10.7 of the settlement provides that the "Side Letter Agreement, Stipulation and the Exhibits attached hereto constitute the entire agreement among the parties hereto and *no representations, warranties or inducements have been made to any party* concerning the Stipulation, the Exhibits or the Side Letter Agreement other than the representations, warranties and covenants contained and memorialized in such documents."[15] The settlement agreement also contained a paragraph preventing any modification of the settlement based on judicial decisions, changes in the financial conditions of any of the parties, any newly discovered facts, events or allegations, or any other conduct which related to the settlement or the released claim. Because the appellants allege that the statements that constituted fraud occurred outside of the settlement

15. Settlement Agreement ¶ 10.7 (emphasis added).

agreement, a cause of action could be maintained only if the merger clause in the agreement did not prohibit admission of those statements.

In a recent Supreme Court case, two suits were initiated on behalf of the stockholders of a Delaware corporation, MCA, Inc., after another corporation tendered an offer for the common stock of MCA.[16] The first suit was a class action, filed in Delaware against MCA and its directors, alleging violations of Delaware law.[17] While that action was pending, the second suit was brought in California, alleging violations of Securities and Exchange Commission Rules 10b-3 and 14d-10.[18] The California district court entered summary judgment for the defendants, and the plaintiffs appealed.[19] Before the appeal was heard, the first suit was settled.[20] The settlement included a release of all claims arising out of the acquisition.[21]

On appeal, the defendants/appellees invoked the Delaware judgment as a bar to further prosecution of the

---

16. *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 369-70, 116 S.Ct. 873, 876, 134 L.Ed.2d 6 (1996).

17. *Id.* at 370, 116 S.Ct. at 876.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

action, relying on the Full Faith and Credit Act, 28 U.S.C. § 1738. The Supreme Court agreed, holding that the Delaware settlement judgment was entitled to full faith and credit, notwithstanding the fact that it released claims within the exclusive jurisdiction of the federal courts.

The Court used a two-step analysis in reaching its decision. The Court first looked to state law to ascertain the rules regarding the preclusive force of class-action settlement judgments in subsequent suits.[22] The Court found that Delaware law held that the judgment barred subsequent pursuit of the claims, even though the federal securities claims could not have been pursued in the state chancery court where the first suit was filed.[23] The Court then looked to the Exchange Act, and noted that although the Act conferred exclusive jurisdiction on federal courts for suits arising under it, it neither allowed "plaintiffs with Exchange Act claims to have more than one day in court to challenge the legality of a securities transaction" . . . nor prevented litigants "from voluntarily releasing Exchange Act claims in judicially approved settlements."[24]

Here, Georgia law regards a settlement as a contract.[25] Merger clauses are enforceable and may prevent parties from

---

22. *Id.* at 375-76, 96 S.Ct. at 878-879.

23. *Id.* at 377, 96 S.Ct. at 880.

24. *Id.* at 381, 96 S.Ct. at 881.

25. *See Southern Med. Corp. v. Liberty Mut. Ins. Co.*, 216 Ga.App. 289, 291, 454 S.E.2d 180 (1995)("an agreement alleged to

(Cont'd)

recovering for fraud, depending on the relief sought. Georgia law is clear that plaintiffs have two options available against a defendant for alleged misrepresentations in a contract action: a plaintiff can affirm the contract and sue for damages, in which case the merger clause applies, or the plaintiff can rescind the contract and sue in tort for alleged fraud, and the merger clause does not prevent introduction of parole evidence.[26] Because the appellants affirmed the contract and sued for damages, the merger clause applies, and they are barred from introducing evidence outside the settlement documents. As the district court noted, the appellants did not allege that there was any fraud within the settlement documents, and thus, they have failed to state a claim.

The appellants rely on *Meason v. Gilbert.*[27] In *Meason*, the court found unenforceable an integration clause in a stock purchase agreement that no representations other than those contained in the prospectus induced the purchaser to buy certain securities.[28] The purchaser alleged that he had been

---

(Cont'd)

be in settlement and compromise of a pending lawsuit must meet the same requisites of formation and enforceability as any other contract.")

26. *See e.g., Velten v. Regis B. Lippert, Intercat, Inc.*, 985 F.2d 1515, 1522 (11th Cir. 1993); *Rampey v. Jay Pontiac GMC Truck, Inc.*, 211 Ga.App. 632, 440 S.E.2d 52 (Ga. Ct. App. 1993); *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794 (Ga. 1974).

27. 236 Ga. 862, 226 S.E.2d 49 (Ga. 1976).

28. 226 S.E.2d at 51.

induced to purchase the securities because of fraudulent oral misrepresentations, and sought rescission of the contract.[29] The court held that to allow a purchaser to waive all violations of the Georgia Securities Act by contract would eviscerate the protections of that statute, and that such a waiver would be void and without effect.[30] However, unlike the appellants, the purchaser in *Meason* sought rescission of the contract.

A case from the Second Circuit is analogous. In *Harsco Corp. v. Segui*,[31] the purchaser of a company brought claims of securities fraud under Rule 10b-5 and state law claims against the company's seller.[32] The transaction had been governed by a written agreement that contained a merger clause explicitly precluding any claim of fraud based on representations not in the agreement.[33] The district court held that the merger clause precluded the plaintiff from establishing reasonable reliance, and the Second Circuit agreed.[34] The appellants attempt to distinguish *Harsco* by arguing that the agreement in that case was more detailed, but as the merger clause in the instant case is specific, this argument is not persuasive.

---

29. *Id.* at 50.

30. *Id.*

31. 91 F.3d 337 (2d Cir. 1996).

32. *Id.* at 339.

33. *Id.* at 342-43.

34. *Id.*

Here, the settlement agreement contained a merger clause specifically stating that the settlement and the attached exhibits constituted the entire agreement, and that no representations, warranties, or inducement were made to any party other than what was contained in the documents. The appellants did not attempt to rescind the settlement, but elected to sue for damages on the contract, rather than in tort. The merger clause governs, and the district court correctly found that the complaint failed to state a claim.

***State law claims***

The appellants also argue that the district court erred in dismissing their state law claims because they pleaded the necessary elements under state law. They raise this argument for the first time in their reply brief, in response to the appellee's contention that the district court properly dismissed the pendant state law claims. Arguments raised for the first time in a reply brief are not properly before this court.[35] Moreover, the district court did not abuse its discretion in deciding that because the appellants' federal claim failed, the state law claims should be dismissed at that early stage of the lawsuit.[36]

The district court's order is AFFIRMED.

---

35. *United States v. Martinez*, 83 F.3d 371, 377 n.6 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 998, 136 L.Ed.2d 877 (1997).

36. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372 n.11, 98 S.Ct. 2396, 2402 n.11, 57 L.Ed.2d 274 (1978) (state claim could be heard in federal court only if an anchoring federal claim extended the district court's jurisdiction over the state claim).

**APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED AND FILED FEBRUARY 12, 1997 AND ENTERED FEBRUARY 13, 1997**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE

NO. 1:95-CV-2994-WBH

WILLIAM J. HALL, BARBARA LISSER, individually and on behalf of all others similarly situated,

Plaintiff

v.

CORAM HEALTHCARE CORPORATION, JAMES M. SWEENEY, PATRICK FORTUNE, and SAM LENO,

Defendant

ORDER

This case is before the Court on defendants Coram Healthcare Corporation ("Coram"), James M. Sweeney, Patrick Fortune, and Sam Leno's motion to dismiss [8-1], plaintiffs Barbara Lisser and William Hall's motion for leave to file supplemental brief in opposition to defendants' motion to dismiss [16-1], plaintiffs' amended motion for leave to

file supplemental brief in opposition to defendants' motion to dismiss [17-1], and plaintiff's motion to refer this case to mediation [20-1] pursuant to United States District Court for the Northern District of Georgia Local Rule ("LR") 290-1 et seq.

## I. BACKGROUND

### *Standard for Motion to Dismiss*

Pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court may dismiss an action or claim against a defendant if the plaintiff, in its pleadings, has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Court must ascertain whether, under any set of facts which could be proven from the complaint, the claims made are so insufficient as to *never* succeed in court, *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *see Oladeinde v. Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992). Therefore, for the purposes of the motion to dismiss now before the Court, the Court accepts all of plaintiffs' factual allegations as true and liberally construes the complaint. *See Hartford Fire Ins. Co. v. California*, __ U.S. __, __, 113 S. Ct. 2891, 2917, 125 L. Ed. 2d 612 (1993). Accordingly, the factual background set forth below reveals only those factual allegations contained in the complaint.

This case arises out of warrants issued to the named plaintiffs and proposed class members as part of a negotiated settlement of prior securities fraud litigation, *In re T² Medical, Inc. Shareholder Litigation*, No. 1:94-CV-744-RLV (N.D.

Ga.) (the "$T^2$ Medical Litigation"). That case settled in 1995 pursuant to a stipulation of settlement dated January 27, 1995 (hereinafter referred to as the "Stipulation").[1] On May 19, 1995, final judgment was entered incorporating the Stipulation. The $T^2$ Medical Litigation was composed of a number of separate complaints of securities fraud against $T^2$ Medical that were consolidated for class action treatment.

In 1994, prior to settlement, $T^2$ Medical merged with three other companies (Curaflex Health Services, Inc., HealthInfusion, Inc., and Medysis, Inc.) to form Coram. Coram is the successor in interest to $T^2$ Medical, Inc. Coram now is considered "the largest provider of alternate site patient care treatment services, including a broad range of infusion therapy services administered at a patient's home or at one of the Company's ambulatory infusion therapy facilities." Amended Complaint ¶ 14, In 1995, Coram owned 140 infusion therapy centers throughout the United States. Its stock is listed on the New York Stock Exchange ("NYSE"). The individual defendants are all current or former officers of Coram who signed reports submitted to the Securities and Exchange Commission ("SEC") containing the alleged misstatements or omissions.

In the Stipulation, the class agreed to settle the pending litigation against $T^2$ Medical for $25 million cash and 2,520,000 warrants convertible into Coram unrestricted common stock. There is no dispute regarding the cash portion of the Stipulation. The plaintiffs in this action, William J.

1. The Stipulation actually was filed with the Court in April 1995; however, it was antedated by agreement of the Court and the parties.

Hall and Barbara Lisser, were members of the certified class in the prior litigation and, as part of the settlement, are entitled to receive or to have received warrants to purchase Coram common stock pursuant to the terms of the Stipulation.[2] The settlement became final on June 16, 1995. No appeal of the final judgment was filed.

The warrants issued are convertible to Coram unrestricted common stock. They carry a four-year maturity, are noncancellable and exercisable at a price of $22,125.[3] The exercise price was determined by a formula set forth in the Stipulation. The formula calculated the exercise price based on the average closing price of Coram stock for the ten business days preceding the day on which the final judgment and order of dismissal in the T² Medical Litigation.

The primary allegation of the Amended Complaints is that the warrants' exercise price was based on artificially inflated market prices of Coram stock for the period used by

---

2. Until recently, the warrants were being held in escrow as part of the Court's directive in the T² Medical litigation. By Order, Judge Vining released the warrants in November 1996. Nevertheless, through the parties' statements, it appears as though the warrants may still be held in escrow by agreement of the parties due to the pendency of this action. The state of the warrants, however, is immaterial to the Court's rulings on the Motion to Dismiss.

3. Defendants have also listed once the exercise price as $20.125. Defs.' Mem, in Supp. of Mot. to Dismiss at 4. The Court assumes that this is a typographical error; however, even if not, the Court accepts the plaintiffs' factual allegations as true and thus recites the $22.125 exercise price.

the formula. The plaintiffs claim generally that the defendants publicly made false and misleading statements and omitted to state material facts, leading to an inflated price.[4] On August 11, 1995, Coram announced a second quarter loss of $66.3 million or $1.62 per share. This led to a considerable decrease in the value of the warrants issued to the plaintiffs as part of the stipulated settlement.

Plaintiffs contend that Coram misled the investing public and the members of the T[2] Medical litigation class by issuing false and misleading statements and omitting material facts from public statements, press releases, and SEC filings regarding Coram's "earnings, profitability and business prospects." Amended Complaint ¶ 2. In particular, plaintiffs allege that Coram falsely represented that it was realizing cost savings as a result of the merger referred to above, that it would complete other mergers and business combinations, that revenues were increasing and would continue to increase, and that the company had adequate cash flow to service debt obligations, The omissions that plaintiffs allege include *inter alia* that Coram was not realizing cost savings as a result of the mergers, that a merger with Lincare would not be consummated as reported, that financial losses would continue, and that there were problems with reporting accounts receivable.

Plaintiffs allege the following claims against defendants: (1) Count I: violations of Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act" or "Exchange Act"), 15

---

4. These losses arose from costs associated with the mergers creating Coram as well as Coram's acquisition of another provider.

U.S.C, § 78j(b), and Rule 10b-5, 17 C.F.R. § 240.10b-5, against Coram and the individual defendants, (2) Count II: violation of Section 20(a) of the 1934 Act, 15 U.S.C. § 78t(a), against the individual defendants; (3) Count III: violation of O.C.G.A. § 10-5-12(a)(2) against all defendants; (4) Count IV: violation of O.C.G.A. § 51-6-4 (fraud by silence) against all defendants; and (5) Count V: breach of implied covenant of good faith and fair dealing against Coram. Pursuant to at least Count V, plaintiffs seek

> an award of damages reflecting the difference in value between 2,520,000 warrants to purchase Coram common stock with an exercise price of $22.125 with Coram common stock at a market price of $18.50 (closing market price on the day the Final Order in the Earlier Class Action became final pursuant to the terms of the Stipulation) and the same number of warrants at the same exercise price with Coram common stock at a market price of $5.25 (the closing price on August 14, 1995, the trading day following Coram's August 11th announcement),

Amended Complaint ¶ 151. In addition, plaintiffs seek "compensatory damages against all defendants jointly and severally in an amount to be proven at trial, together with prejudgment and post-[j]udgment interest at the maximum rate allowable by law." *Id.* at 71 ("Prayer for Relief").

*Appendix B*

## II. DISCUSSION

A. *Plaintiffs' Motion for Leave to File a Supplemental Brief in Opposition to Defendants' Motion to Dismiss*

The Court addresses that the plaintiffs' motion and amended motion for leave to file a supplemental memorandum in opposition to defendants' motion to dismiss. In effect, plaintiffs seek to supplement the record before the Court with defendants' brief to the Eleventh Circuit Court of Appeals in the $T^2$ Medical Litigation, *In re $T^2$ Medical, Inc. Shareholder Litigation*, No. 95-9418 (11th Cir,). A motion to supplement the record, although it may be appropriate on a motion for summary judgment, is not appropriate on a motion to dismiss. A Court deciding a motion to dismiss considers *only* the pleadings and not material outside of the pleadings, Fed. R. Civ. P. 12(b). However, if the Court weighs material outside of the pleadings, then the motion is treated as one for summary judgment under Federal Rule of Civil Procedure 56, *Id.* Fed. R. Civ. P. 12(c).

Defendants submit extensive material with their "motion to dismiss," including a copy of the Stipulation.[5] Plaintiffs, however, submit no evidence in response, with the exception of the defendants' brief to the Eleventh Circuit. Recognizing

---

5. The Court notes that defendants' brief in support of the motion to dismiss exceeds the page limitations set by LR 220-1(d), Although the Court could strike the brief under LR 220-1(f), the Court will not do so because of the length of time in which this motion has been pending. Nevertheless, counsel is instructed to comply with the Local Rules or future briefs in this case or others may be stricken pursuant to LR 220-1(f).

the limitations of evidence to be considered with the motion to dismiss, defendants argue that the Court can consider the Stipulation because " '[o]therwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied,' " Defs,' Mem, in Supp. of Mot. to Dismiss at 9-10 (quoting *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993)), Defendants also argue that this same reasoning allows the Court to consider orders from the $T^2$ Medical Litigation. Plaintiffs do not object to the consideration of this undisputed evidence, and rely on the Stipulation as well as the previous orders in the Amended complaint. Therefore, even though plaintiffs state that they "are not litigating the terms of the Stipulation or Final Judgment that released the claims in the Earlier Litigation during the Earlier Class Period," Pls.' Resp. to Mot. to Dismiss at 9, the Court will consider that evidence as though it was submitted with plaintiffs' complaint and not as though the evidence was filed outside of the pleadings. Thus, the motion to dismiss is not converted automatically to a motion for summary judgment and the standards for reviewing a motion to dismiss are applied.

The Eleventh Circuit brief filed on appeal of plaintiffs' Motion to Enforce Stipulation filed as a part of the $T^2$ Medical Litigation is necessarily outside of the plaintiffs' complaint in this new case. Therefore, the Court DENIES plaintiffs' motion and amended motion for leave to file a supplemental brief in opposition to the motion to dismiss. Additionally, the Court also rejects the affidavit of John B. Torkelson submitted by defendants, which cannot be accepted in these circumstances.

*Appendix B*

B. *Defendants' Motion to Dismiss*

Defendants submit that the Stipulation prevents the plaintiffs from seeking the relief requested in the Amended Complaint, and, thus, the Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). Coram and the individual defendants suggest that the complaint is barred by the Stipulation because of its specific terms including the merger clause, the release, and the bar against modification and because of res judicata or collateral estoppel principles barring plaintiffs from relitigating claims determined by the final judgment entered in the $T^2$ Medical Litigation. For reasons that will become clear below, only one of those arguments need be addressed by the Court.

The Stipulation is a contract subject to the ordinary rules of contract construction. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 27 F.3d 521, 524 (11th Cir. 1994) (per curiam) (attaching appendix of Georgia Supreme Court opinion, 264 Ga. 295, 298, 443 S.E.2d 833, 836 (1994)). To the extent that the Stipulation pertains to federal claims, it is to be construed according to federal common law. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 996, 993 n. 11 (11th Cir. 1993) (applying rule regarding releases to federal antitrust claims). In construing the settlement contract, the Court is "not permitted to modify settlement terms or in any manner to rewrite the agreement reached by the plaintiffs." *Holmes v. Continental Can Co.*, 706 F.2d 1144,1160 (11th Cir. 1983).

Paragraph 10.7 of the Stipulation provides that the "Side Letter Agreement, Stipulation and the Exhibits attached

hereto constitute the entire agreement among the parties hereto and *no representations, warranties or inducements have been made to any party* concerning the Stipulation . . . other than the representations, warranties and covenants contained and memorialized in such documents." Stipulation ¶ 10.7 (emphasis added). Defendants maintain that this paragraph ban plaintiffs from bringing this securities fraud action because plaintiffs cannot sue for representations made outside of the Stipulation. *See* Defs.' Mem. in Supp. of Mot. to Dismiss at 13-14.

Under Georgia state law, merger clauses are enforceable and may prevent a party from recovering for fraud in the inducement of a contract.[6] If a contract contains a merger or "entire agreement" clause and the injured party seeks damages on the contract rather than rescission, then the clause will prevent recovery by estopping the claimant from asserting reliance on any misrepresentations (or omissions) allegedly made outside of the four corners of the contract, *Rampey v. Jay Pontiac GMC Truck, Inc.*, 211 Ga. App. 632, 633, 440 S.E.2d 52 (Ga. Ct. App, 1993); *Potomac Leasing Co. v. Thrasher*, 181 Ga. App. 883, 884, 354 S.2d 210 (Ga. Ct. App. 1987). Although this case involves the interpretation of federal common law, the rule should be no different here, *Cf. Hauser v. Life Gen. Sec. Ins. Co.*, 56 F.3d 1330, 1333 (11th Cir. 1995) (holding that in fashioning federal common law for ERISA, "a federal court may borrow from state law where appropriate, and [may be] guided by the policies expressed in ERISA and other federal labor laws. . . ." (quoting *Reid v. Prudential Ins. Co.*, 755 F. Supp. 372, 375 (M.D. Fla. 1990))).

6. Plaintiffs' claims essentially involve fraud in the inducement of the Stipulation.

*Appendix B*

Plaintiffs bring federal and state law claims arguing that Coram perpetrated a fraud on the market and a fraud on the plaintiffs by making material misstatements and omitting to state material facts regarding the financial stability and future of the company. In a Section 10b or Rule 10b-5 action, plaintiffs must be able to demonstrate reliance on the material misrepresentation or omission either through a fraud on the market theory or face-to-face negotiations. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 243, 108 S. Ct. 978, 989, 99 L. Ed. 2d 194 (1998)("[R]eliance is an element of a Rule 10b-5 cause of action."). In the Stipulation, however, plaintiffs specifically disavowed reliance on statements not included in the settlement documents. Notably, plaintiffs do not respond to the merger argument.

In their Amended Complaint, plaintiffs show no statements within the Stipulation by which they were defrauded.[7] As a result, they can prove no set of facts under the Amended Complaint which would entitle them to relief. Therefore, as a matter of law, the motion to dismiss is GRANTED as to plaintiff's federal securities law claims.[8]

---

7. Plaintiffs stated that the "materially false and misleading statements and omissions . . . concerning earnings, profitability and business prospects of Coram . . . were contained in or omitted from public statements, press releases and filings with the [SEC]." Amended Complaint at ¶ 2.

8. Because of the secondary of liability under § 20(a), the dismissal of the § 10b-5 claim necessitates the dismissal of the § 20(a) claim as well. *Goldberg v. Hankin*, 835 F. Supp. 815, 818 (E.D. Pa. 1993) (citing *Shapiro v. UJB Financial Corp.*), 964 F.2d

(Cont'd)

The remainder of plaintiff's claims are grounded in state law (allegations of violations of O.C.G.A. § 10-5-12(a)(2), violations of O.C.G.A. § 51-6-4, and breach of implied covenant of good faith and fair dealing). Plaintiffs have cited only one basis for jurisdiction before this Court, federal question jurisdiction. *See* Amended Complaint ¶ 7. Where the federal claims which federal jurisdiction is based on dismissal prior to trial, "the state claim should be dismissed as well." *United Mine Workers of Am. v. Gibbs*, 383 US. 715, 726, 86 S. Ct. 1130, 1139, __ L. Ed. 2d __ (1966); *See Faucher v. Rodzicwicz*, 891 F.2d 864, 871-72 (11th Cir. 1990) (concluding that district court did not abuse its discretion in dismissing pendent state law claims where the federal claims underlying federal question jurisdiction have been dismissed). Therefore, the Court dismisses the state law claims.

C. *Plaintiffs' Motion to Refer Case to Mediation*

Because the Court dismisses the claims contained in plaintiffs' Amended Complaint, this motion is DENIED AS MOOT.

---

(Cont'd)
272, 279 (3d Cir. 1992)), *aff'd* 30 F.3d 1486 (3d Cir. 1994); *see Brown v. Enstar Group, Inc.*, 84 F.3d 393, 396-97 (11th Cir. 1996) (holding that to recover under § 20(a) claim, plaintiff "must also establish that the controlled person violated the securities laws").

*Appendix B*

## III. CONCLUSION

For the reasons above, the Court DENIES plaintiffs' motion and amended motion for leave to file a supplemental memorandum in opposition to defendant's motion for summary judgment [16-1, 17-1]. The Court GRANTS defendants' motion to dismiss [8-1]. The Court dismisses Counts I and II of plaintiffs' Amended Complaint on the merits and dismisses Counts III, IV, and V without prejudice. Lastly, the Court DENIES plaintiffs' motion to refer case to mediation as MOOT [20-1].

It is so ORDERED this 12 day of February, 1997.

s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States District Court

## APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 14, 1998

## IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-8246

WILLIAM J. HALL, BARBARA LISSER, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

versus

CORAM HEALTHCARE CORPORATION, JAMES M. SWEENEY, PATRICK FORTUNE, SAM LENO,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

*ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC*
(Opinion _____, 11th Cir., 19 __, __ F.2d __)

BEFORE: EDMONSON and HULL, Circuit Judges, and Clark, Senior Circuit Judge.

*Appendix C*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Thomas A. Clark
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 16 2000
OFFICE OF THE CLERK

No. 98-1490

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

---

WILLIAM J. HALL, BARBARA LISSER,
on behalf of themselves and all others similarly situated,
*Petitioners,*

v.

CORAM HEALTHCARE CORPORATION,
JAMES M. SWEENY, PATRICK FORTUNE, and SAM LENO,
*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

MICHAEL P. KENNY
*Counsel of Record*
TERESA T. BONDER
RUTH L. GREENBERG
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
*Counsel for Respondents*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2 OPP

## QUESTIONS PRESENTED

A. Whether the Eleventh Circuit Court of Appeals correctly held that the merger clause contained in the Stipulation of Settlement precludes Petitioners as a matter of law from asserting the claims in their Complaint.

B. Whether the terms of the Stipulation of Settlement expressly prohibit the relief sought by Petitioners.

C. Whether Petitioners' claims are barred by the preclusive effects of a prior final judgment, which affirmed and incorporated the terms of the Stipulation of Settlement, in a related class action and of a final decision on the merits that denied Petitioners' attempt to modify the Stipulation of Settlement based on the same factual allegations as set forth in the Complaint in this case.

D. Whether Petitioners have failed to state a claim for securities fraud because they have not alleged justifiable reliance on any misrepresentations made to them by Respondents.

E. Whether Petitioners lack standing to state a claim for securities fraud because they are not purchasers or sellers of securities.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 8 |
| A. Because No Split In The Circuits Exists, The Court Has No Grounds On Which To Base A Grant Of The Petition For Writ Of Certiorari | 8 |
| B. The Eleventh Circuit's Decision In This Case Is Consistent With Recent Law In Other Circuits And Supreme Court Precedent | 11 |
| C. Petitioners' Reasoning Is Inconsistent With The Policy And Practices Of Allowing Parties To Settle Federal Securities Claims | 14 |
| CONCLUSION | 16 |

## TABLE OF AUTHORITIES


CASES — Page

*Basic Inc. v. Levinson*, 485 U.S. 224 (1988) ..... 4, 11
*Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1437 (11th Cir. 1988) ..... 7
*Coker v. Trans World Airlines, Inc.*, 165 F.3d 579 (7th Cir. 1999) ..... 7
*Cotton v Hinton*, 559 F.2d 1326 (5th Cir. 1977) ..... 15
*Federal Deposit Ins. Corp. v. Verex Assurance, Inc.*, 3 F.3d 391 (11th Cir. 1993) ..... 7
*Freytag v. Commissioner of Internal Rev.*, 501 U.S. 868 (1991) ..... 7
*Hall v. Coram Healthcare, Inc.*, 157 F.3d 1286 (11th Cir. 1998) ..... 6
*Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996) ..... 12
*Hubbard v. United States*, 514 U.S. 695 (1995) ..... 11
*Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113 (2d Cir. 1977) ..... 13, 14
*Matsushita Elec. Indus Co. Ltd. v. Epstein*, 516 U.S. 367 (1996) ..... 11, 14, 15
*Meason v. Gilbert*, 226 S.E.2d 49 (Ga. 1976) ..... 5
*Norwest Bank of North Dakota, N.A. v. Doth*, 159 F.3d 328 (8th Cir. 1998) ..... 7
*Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 33 (1st Cir. 1977) ..... 14
*Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992) ..... 13, 14
*Rogen v. Ilikon*, 361 F.2d 260 (1st Cir. 1966) ..... 8, 9, 10
*Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) ..... 14
*Thomas R.W. v. Massachusetts Dept. of Educ.*, 130 F.3d 477 (1st Cir. 1997) ..... 7
*Wald v. Wolfson (In re U.S. Oil and Gas Litig.)*, 967 F.2d 1337 (11th Cir. 1992) ..... 15

STATUTES

15 U.S.C. § 78j(b) ..... *passim*
15 U.S.C. § 78t(a) ..... 3

TABLE OF AUTHORITIES—Continued

Page

15 U.S.C. § 78cc(a) ..... *passim*
17 C.F.R. § 240.10b-5 ..... *passim*

RULE

Fed. R. Civ. P. 12 ..... *passim*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

---

No. 98-1490

---

WILLIAM J. HALL, BARBARA LISSER,
on behalf of themselves and all others similarly situated,
*Petitioners,*

v.

CORAM HEALTHCARE CORPORATION,
JAMES M. SWEENY, PATRICK FORTUNE, and SAM LENO,
*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## RESPONDENTS' BRIEF IN OPPOSITION

---

### STATEMENT OF THE CASE

This case has a long history. Petitioners' claims in the District Court purportedly relate to an earlier federal securities class action that, after protracted negotiations, resulted in a comprehensive settlement. The earlier litigation involved consolidated nationwide class actions that had been filed in 1992 and 1993 against $T^2$ Medical, Inc. ("$T^2$") and certain members of its senior management alleging violations of the federal securities laws. *In re $T^2$ Medical, Inc. Shareholder Litigation*, Master File No. 1:94-CV-744-RLV, United States District Court for the Northern District Court of Georgia.

After extensive negotiations, Petitioners entered into a Stipulation of Settlement (the "Settlement") dated January 27, 1995, with Coram Healthcare Corporation ("Coram"), T[2]'s successor corporation.[1] [R. 2-8, Ex. A.] Petitioners voluntarily agreed to release "all claims, . . . known or unknown, suspected or unsuspected, . . . whether or not concealed or hidden of every nature and description whatsoever," that were asserted or could have been asserted as of the effective date of the Settlement. [R. 2-8, Ex. A, ¶ 1.17.] Petitioners also expressly agreed that the Settlement could not be modified as a result of alleged newly discovered facts, events, or legal issues, and that "no representations, warranties or inducements have been made" concerning the Settlement, other than those contained in the stipulation (the "merger clause"). [R. 2-8, Ex. A, ¶ 10.7.]

In exchange for these releases and agreements, Coram paid the Petitioners $25 million in cash and issued to Petitioners 2,520,000 warrants convertible into Coram unrestricted stock. [R. 2-8, Ex. A, ¶¶ 2.1(a), 2.3.] Over the next several months and after protracted negotiations, the parties ultimately agreed to key terms related to the warrants, including a formula by which the exercise price of the warrants would be set.[2] The District Court then approved the settlement terms in an Order of the Court, which was signed on May 19, 1995. [R. 2-8, Ex. D.] That judgment became final pursuant to its own terms on June 19, 1995.

---

[1] Petitioners inaccurately suggest in their Petition that Coram is "a stranger to the prior litigation." [Pet. for Writ of Cert. at 12.] In fact, Petitioners, through their knowledgeable and experienced counsel, painstakingly negotiated and ultimately entered into the Settlement *with Coram*, T[2]'s successor corporation, specifically bargaining for Coram stock.

[2] The exercise price was calculated at $22.125. (Warrant Agreement, 2.01 [R. 2-8, Ex. B.])

On November 21, 1995, Petitioners filed a Complaint against Coram and certain of its officers and directors, the Respondents herein, alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder, as well as certain state law violations. [R. 1-1.] Petitioners alleged in their Complaint that "Coram common stock and, in turn, the Warrants were artificially inflated *at the time* plaintiffs agreed to settle the earlier litigation and *at the time* the settlement was submitted to the Court for approval." [R. 1-1, ¶ 3 (emphasis added).] Petitioners alleged that the Respondents issued false and misleading statements "from at least November 1994" and "for several fiscal quarters preceding the final determination of the exercise price of the warrants." [R. 1.1, ¶¶ 32, 97.] According to Petitioners, the alleged fraudulent conduct artificially inflated the value of Coram stock and the warrants that they had obtained pursuant to the Settlement. Petitioners did not allege direct reliance on any fraudulent statements made during settlement negotiations or elsewhere, but rather that they "rel[ied] upon the integrity of the market" in agreeing to accept warrants. [R. 1-1, ¶ 122.]

In their Petition, Petitioners mischaracterize the allegations contained in the Complaint, which was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). In direct conflict with the Complaint's allegations, Petitioners now assert, without citation to the Complaint, that, "[i]t was during the Formula Period, the period between the effective date of the settlement and the June exercise pricing of the warrants, that the fraud occurred." [Pet. for Writ of Cert. at 2-3.] Petitioners cannot revise by argument years later their Complaint's allegations that the alleged fraud occurred "[d]uring the pendency of the settlement of the Earlier Class Action," in an attempt to avoid the effect of

the Settlement's merger clause. [R. 1-1, ¶ 63.] Given the procedural posture of this case, the allegations in the Complaint control.[3]

As reflected in the Complaint, Petitioners did not attempt to rescind the Settlement. Instead, they affirmed the Settlement agreement, kept the $25 million in cash that Coram had paid, and sued for the alleged loss in value of the warrants.

Respondents moved to dismiss Petitioners' Complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The grounds for Respondents' motion included the following: (1) Petitioners' claims are barred by specific terms of the Settlement, including the release and waiver provisions and the merger clause; (2) Petitioners cannot adequately plead the essential element of reliance under the fraud-on-the-market theory; (3) Petitioners' claims are barred by the doctrines of res judicata and collateral estoppel; (4) Petitioners have no standing to assert claims under Section 10(b) of the Securities Exchange Act of 1934, because they are not purchasers of securities, and (5) Petitioners have not suffered any cognizable damages, because they still hold the warrants.[4] [R. 2-8.] Significantly, Petitioners did not raise before the District Court the issue that they now contend is the controlling ques-

---

[3] Even under their newly articulated contention that the alleged fraud occurred after the Settlement was finalized, Petitioners' Section 10(b) claim is still without merit. In *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978 (1988), this Court noted that in order to state a claim under the federal securities laws, a plaintiff must have relied on a misrepresentation of fact. If Petitioners had already signed the Settlement at issue before the alleged fraud occurred, then, as a matter of law, they cannot establish the essential reliance element of their claim.

[4] Thus, even if the Court were to grant certiorari and reverse the lower courts' decisions, this case would nonetheless likely be dismissed on remand.

tion: the effect of Section 29(a) of the Securities Exchange Act of 1934 on the Settlement's release and merger provisions.

On February 12, 1997, the District Court granted Respondents' motion to dismiss the Complaint, finding that Petitioners' action was barred by the merger clause contained in the Settlement. [Pet. for Writ of Cert., App. B.] The merger clause provides:

> [The] Side Letter Agreement, Stipulation and the Exhibits attached hereto constitute the entire agreement among the parties hereto and no representations, warranties or inducements have been made to any party concerning the Stipulation, the Exhibits or the Side Letter Agreement other than the representations, warranties and covenants contained and memorialized in such documents.

[R. 2-8, Ex. A, ¶ 9.7.] In holding that Petitioners were barred from prosecuting the suit, the District Court reasoned as follows:

> If a contract contains a merger or 'entire agreement' clause and the injured party seeks damages on the contract *rather than rescission*, then the clause will prevent recovery by estopping the claimant from asserting reliance on any misrepresentations (or omissions) allegedly made outside of the four corners of the contract.

[Pet. for Writ of Cert., App. B at 21a (citations omitted) (emphasis added).]

Petitioners filed their appeal in the Eleventh Circuit on March 13, 1997. [R. 3-25.] In their opening appellate brief, Petitioners again failed to argue the question they now present to this Court: whether Section 29(a) prevents enforcement of the Settlement's merger clause. Instead, Petitioners relied heavily on *Meason v. Gilbert*, 236 Ga. 862, 226 S.E.2d 49 (Ga. 1976), a Supreme

Court of Georgia case in which the plaintiff was permitted to rescind a contract and sue for fraud, despite the contract's merger clause.

On October 15, 1998, the Eleventh Circuit affirmed the District Court's dismissal of Petitioners' Complaint. In so affirming, the Court of Apeals recognized that, unlike Petitioners, the plaintiff in *Meason* sought to rescind the contract at issue. The court wrote:

> Here, the settlement agreement contained a merger clause specifically stating that the settlement and the attached exhibits constituted the entire agreement, and that no representations, warranties, or inducements were made to any party other than what was contained in the documents. The appellants did not attempt to rescind the settlement, but elected to sue for damages on the contract, rather than in tort. The merger clause governs, and the district court correctly found that the complaint failed to state a claim.

*Hall v. Coram Healthcare Corp.*, 157 F.3d 1286, 1290 (11th Cir. 1998).

Petitioners then filed their Petition for Writ of Certiorari on March 16, 1999, essentially asking this Court to review a statutory provision that the District Court did not have the opportunity to examine and to address a line of reasoning that has been waived. Thus, if certiorari were granted, this Court would be the inaugural court to decide the issue now raised by Petitioners.

For these reasons, Respondents submit that Petitioners are disingenuously characterizing the question presented in their Petition as whether the Eleventh Circuit violated the express language of Section 29(a) in upholding the Settlement. Petitioners further misleadingly assert that the Eleventh Circuit "rejected the application of Section 29(a)." [Pet. for Writ of Cert. at 13.] In fact,

Petitioners chose not to assert their Section 29(a) argument either in the District Court or in their opening brief to the Court of Appeals.

Because Petitioners did not present their argument based on Section 29(a) to the District Court for review, the issue was not preserved for appeal and has been waived. *See Freytag v. Commissioner*, 501 U.S. 868, 894-95, 111 S. Ct. 2631, 2647 (1991) ("The very word 'review' presupposes that a litigant's arguments have been raised and considered in the tribunal of first instance. To abandon that principle is to encourage the practice of 'sandbagging' . . . .") (Scalia, J. concurring in part and concurring in the judgment). *See also Blue Cross & Blue Shield v. Sanders*, 138 F.3d 1347, 1357 (11th Cir. 1998) (finding that argument that had not been raised at district court level was waived); *Federal Deposit Ins. Corp. v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993).

In fact, Petitioners did not argue that Section 29(a) operates to shield them from the Settlement's merger clause until their reply brief to the Eleventh Circuit.[5] Because they did not raise the argument in their opening brief, the argument was waived for purposes of review. *See Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir. 1999), *Norwest Bank, N.A. v. Doth*, 159 F.3d 328, 334 (8th Cir. 1998) (stating that issues first raised in reply briefs ordinarily will not be considered); *Thomas R.W. v. Massachusetts Dept. of Educ.*, 130 F.3d 477, 480 (1st Cir. 1997) ("[B]ecause an appellee is entitled to rely on the content of appellant's brief for the scope of the issues appealed, an[] appellant generally may not pre-

---

[5] In their initial brief to the Eleventh Circuit, Petitioners referred to Section 29(a) only once, in a "*see also*" cite in a footnote, but, as in the District Court, Petitioners did not suggest that this provision should serve as a basis for invalidating the Settlement's merger clause.

serve a claim merely by referring to it in a reply brief or at oral argument.") (citation and internal quotation marks omitted).

Neither the District Court nor the Eleventh Circuit was given the opportunity to address Section 29(a) in the context of this case. Rather, the issue presented to both courts was the enforceability of a carefully crafted settlement agreement negotiated by parties having equal bargaining power. Accordingly, Petitioners have waived their Section 29(a) argument.

## REASONS FOR DENYING THE WRIT

Petitioners contend that certiorari should be granted pursuant to Supreme Court Rule 10, because the Eleventh Circuit's opinion in this case and the First Circuit's opinion in *Rogen v. Ilikon,* 361 F.2d 260 (1st Cir. 1966), create a split within the circuit courts regarding the applicability of Section 29(a) of the Securities Exchange Act of 1934 to agreements settling federal securities claims. [Pet. for Writ of Cert. at ii.] This contention is incorrect, because the Eleventh Circuit's opinion involves questions that are factually and legally distinct from those at issue in *Rogen.* Accordingly, because the two cases do not conflict, there is no controversy between or among the circuit courts that demands Supreme Court intervention pursuant to Rule 10. Indeed, recent decisions demonstrate that courts are generally in agreeemnt, among themselves and with Supreme Court precedent, regarding the effect to give a merger clause and similar settlement provisions in subsequent litigation.

### A. Because No Split In The Circuits Exists, The Court Has No Grounds On Which To Base A Grant Of The Petition For Writ Of Certiorari

The Eleventh Circuit's decision, upholding a negotiated settlement agreement that disposes of federal securities

claims and that precludes Petitioners from overriding the contract's express language, does not conflict with the First Circuit's opinion in *Rogen v. Ilikon*. The very fact that the *Rogen* case is 33 years old makes dubious any argument that there is some "split of authority" on an important issue that has been percolating through the lower courts in recent years, resulting in contradictory decisions, and requiring resolution by this Court. Furthermore, *Rogen* is both legally and factually distinguishable.

Specifically, the First Circuit in *Rogen* did not hold that enforcing a federal securities settlement agreement on behalf of a competently represented nationwide class violates Section 29(a), as Petitioners contend the Eleventh Circuit should have held in this case. The *Rogen* decision is, therefore, not in direct conflict with the Eleventh Circuit's decision.

The issue decided by the First Circuit was entirely different from that decided by the Eleventh Circuit. The First Circuit held that a genuine issue of material fact existed as to whether the plaintiff would have found certain omitted facts material and whether the plaintiff relied on the alleged non-disclosures to his detriment. *Rogen*, 361 F.2d at 26-67. In contrast, the Eleventh Circuit ruled that Petitioners could not avoid the terms of a comprehensive settlement, which resulted from painstaking negotiations designed to terminate the ongoing, protracted litigation once and for all.

Indeed, the First Circuit only mentions Section 29(a) in a passing "comment." *See id* at 268. In that comment, the court dismissively states that the non-reliance provision of the contract did not alter its analysis that, considering the evidence in the light most favorable to the plaintiff, a trier of fact could find in his favor. *Id.* at 268. In its remarks regarding the non-reliance provision of the contract, the court acknowledged that it was "not aware

of other judicial treatment of such a provision." *Id.* Given that the case was decided more than 30 years ago, this admission is not surprising. In sum, the First Circuit did not base its holding on an analysis of Section 29(a), and it never addressed whether a merger clause in a settlement agreement that resolves class-wide claims is enforceable where the class members never attempted to rescind the contract.

In addition, *Rogen* involved facts significantly different from those here. First, in *Rogen*, there was no merger clause in the relevant agreement. The District Court and Eleventh Circuit, in contrast, premised their decisions on the Settlement's merger clause. *Rogen* is accordingly not an appropriate counterpart to this case. Second, unlike Petitioners, the plaintiff in *Rogen* did seek rescission of the relevant contract. *See Rogen,* 361 F.2d at 265. Indeed, the compelling facts in *Rogen* show that the defendants had put the plaintiff in an impossible position by rejecting the plaintiff's request for recission and simultaneously arguing that he was bound by the contract's terms. *Id.* at 268. Conversely, Petitioners never sought to rescind the Settlement and tender back the $25 million that they received. Petitioners, therefore, voluntarily elected their remedy to affirm and to sue under the Settlement contract.

Furthermore, the *Rogen* court noted that the plaintiff did not appear to be a sophisticated seller or "experienced business man," but instead seemed "exceedingly gullible" or "overtrusting" and, viewing the evidence most favorably to the plaintiff, might have been "negligent—perhaps grossly so." *Rogen*, 361 F.2d at 267 (citations and internal quotation marks omitted). In this case, Petitioners were represented in the settlement negotiations by more than 60 law firms experienced in federal securities class action litigation.

Finally, the plaintiff in *Rogen* alleged that he relied on the defendants' representations and omissions made *during the negotiation of the contract.* Conversely, the representatives of the nationwide class, represented by numerous law firms, were not unsophisticated or overly trusting in the least and have never alleged that the negotiations were in any way tainted by fraud. To the contrary, unlike in *Rogen,* the settlement agreement at issue here is the product of extensive discovery and protracted bargaining among equals.[6] For these numerous reasons, the Eleventh Circuit's decision in no way conflicts with the First Circuit's 1966 opinion in *Rogen.*

The issues presented here are neither controversial nor have they figured prominently in recent jurisprudential discourse. Indeed, this case does not satisfy the Court's "high degree of selectivity" standard,[7] because no conflict between or among the circuits exists. For these reasons, Respondents respectfully request that the Court deny Petitioners' Petition for Writ of Certiorari.

**B. The Eleventh Circuit's Decision In This Case Is Consistent With Recent Law In Other Circuits And Supreme Court Precedent**

The Eleventh Circuit's holding neither conflicts with more recent cases examining comparable issues nor conflicts with any prior Supreme Court decision. In fact, the Eleventh Circuit obtained substantial guidance from the

---

[6] Rather than impugn the integrity of the settlement process, Petitioners attempt to prove the essential reliance element in their Section 10(b) claim through the fraud-on-the-market theory. But, where one relies on something other than the integrity of the market to purchase stock, such as in direct transactions with the seller, the fraud-on-the-market theory does not apply. *Basic Inc.*, 485 U.S. at 244.

[7] *Hubbard v. United States*, 514 U.S. 695, 720, 115 S. Ct. 1754, 1767 (1995) (Rehnquist, C.J., dissenting).

Court's recent decision in *Matsushita Elec. Indus. Co., Ltd. v. Epstein,* 516 U.S. 367, 116 S. Ct. 873 (1996). In addition, recent case law shows general circuit harmony with regard to the effect that a merger clause, such as the one relevant here, has on subsequent litigation brought by a sophisticated and ably represented party that voluntarily waived its rights to sue and voluntarily disavowed reliance on anything not contained within the relevant written agreement.

For example, the Eleventh Circuit decision is consistent with the Second Circuit decision in *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996), where the court dismissed securities fraud claims brought in connection with a stock purchase agreement that contained a merger clause. The Second Circuit rejected the argument that the merger clause constituted an impermissible waiver of securities fraud claims in violation of Section 29(a) and affirmed the dismissal of the plaintiff's claims for failure to plead justifiable reliance. The court held that, although the contract provisions "weaken" the purchaser's ability to recover under Rule 10b-5, "such a 'weakening' does not constitute a forbidden waiver of compliance [with the securities laws.]" *Harsco,* 91 F.3d at 343.

In reaching its decision, the court noted that there was no "disparity in bargaining power" between the parties, and that the purchaser had taken precautions to determine independently the value of the stock it was purchasing. *Id.* at 344. The Second Circuit also noted that the parties had negotiated to include certain representations in the agreement, any of which, if fraudulent, could provide the basis for a securities fraud action. "Thus, it is not fair to characterize [the 'no representations' clause and the merger clause] as having prevented [the purchaser] from protecting its substantive rights. [The purchaser] rigorously defined those rights in [the agreement.]" *Id.*

Similarly, in *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), the Ninth Circuit upheld the merger clause contained in a settlement agreement pursuant to which the plaintiffs had obtained a cash payment and the transfer of certain securities. *Id.* at 1338. The court dismissed the plaintiff's subsequent securities fraud claim based on the comprehensive release entered into as part of the settlement. *Id.* at 1339. On appeal, the plaintiff argued that enforcing the release as to the federal securities claim would violate Section 29(a). The Ninth Circuit held that the release could be enforced to bar the securities claim and explained, "[w]hen, as here, a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel, the general rule is that if 'the language of the release is clear, . . . the intent of the parties is indicated by the language employed'." *Id.* at 1342 (quoting *Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113, 1115 (2d Cir. 1977) (upholding release in a settlement agreement arising out of a lawsuit where violations of federal securities laws were alleged, on the grounds that the parties had equal bargaining positions as well as access to counsel)) (internal quotation marks omitted).

Significantly, in *Takessian*, the Ninth Circuit also held that, because of the "adversarial setting that is characteristic of litigation," the typical disparity of bargaining power and access to information did not exist. *Takessian*, 967 F.2d at 1341. The court concluded that "allowing the assertion of a federal securities claim in the face of such a complete settlement agreement would discourage settlement negotiations in all litigation in which a federal securities claim may eventually be discovered." *Id.* at 1339 (citation omitted).

Here, the Eleventh Circuit's decision is entirely consistent with the decisions of the Second and Ninth Circuits

and does not conflict with any other circuit court holding. Accordingly, the Petition in this case does not present a conflict or any other rationale justifying certiorari.

### C. Petitioners' Reasoning Is Inconsistent With The Policy And Practice Of Allowing Parties To Settle Federal Securities Claims

Petitioners argue that *Rogen* stands for the proposition that settlement provisions purporting to give liability waivers and other assurances to negotiating parties violate Section 29(a). The logic of this argument suggests that Section 29(a) effectively prevents parties from achieving finality in settlements of federal securities claims, where a release of securities law claims is a necessary part of their agreement. The logic of Petitioners' argument is not supported by case law, which shows that settlements and releases of federal securities claims are commonplace and enforceable without regard to Section 29(a). *See, e.g., Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991); *Petro-Ventures, Inc.*, 967 F.2d at 1342; *Locafrance*, 558 F.2d at 1115.

Indeed, this Court's decision in *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 516 U.S. 367, 375, 116 S. Ct. 873, 878 (1996), recognizes that, for settlement purposes, a federal securities claim is fundamentally like any other.[8]

---

[8] In a related vein, this Court's opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987), also demonstrates that federal securities claims are not unique. In *McMahon*, the Court rejected the argument, similar to the argument advanced by Petitioners, that Section 29(a) prevented the enforcement of a predispute arbitration agreement. *McMahon*, 482 U.S. at 228. In reaching its decision, the Court reasoned that because Section 27 of the Exchange Act did not "impose any duty with which persons trading in securities must 'comply,'" Section 29(a) did not prevent the jurisdictional waiver in the arbitration agreement. *Id.* Given the Court's holding, Petitioners' citation to *McMahon* is misleading. [*See* Pet. for Writ of Cert. at 6.] Although

In giving effect to the entry of a comprehensive class action settlement in a related state court litigation, this Court held that the respondents, who were members of the state court class action, were barred from prosecuting their federal securities claims. *Matsushita Elec. Indus. Co.*, 516 U.S. at 385-86. Thus, as a practical matter, the respondents were deemed to have released their federal securities claims through settlement.

This result is not surprising because, on the whole, "[p]ublic policy strongly favors the pretrial settlement of class action lawsuits." *Wald v. Wolfson (In re U.S. Oil & Gas Litig.)*, 967 F.2d 489, 493 (11th Cir. 1992) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). Settlements of complex class action cases are favored, not only because they help conserve judicial resources, but they also allow parties to "establish[] a general peace." *See Takessian*, 967 F.2d at 1342 (citation omitted). In this case, Respond ts bargained for finality. For this "peace," they agreed to pay Petitioners a handsome sum, and Petitioners voluntarily accepted the bargain, knowing its terms.

Petitioners have presented the Court with no grounds for granting their Petition, but instead they ask the Court to review a settled issue and render a decision that undermines sound public policy. Specifically, if Petitioners are able to override the explicit terms for which they bargained, incentives to end disputes through settlement will weaken. Under the precedent that Petitioners request, every comprehensive settlement agreement intended to resolve litigation fully and finally would be vulnerable to attack when one party determines, after the fact, that certain terms are no longer to its liking. Accordingly, the current state of the law should be preserved. As the Eleventh Circuit

---

cited favorably, *McMahon* rejects, rather than supports, Petitioners' Section 29(a) argument.

has explained: "Defendants buy little peace through settlement unless they are assured that they will be protected" against future liability. *In re U.S. Oil & Gas Litig.*, 967 F.2d at 493-94.

## CONCLUSION

Wherefore, for all the foregoing reasons, Respondents pray that this Court deny this Petition for Writ of Certiorari, because there is no split of authority between or among the circuits on the issue of Section 29(a)'s effect on settlements of federal securities claims or on the issue addressed by the Eleventh Circuit Court of Appeals below.

Respectfully submitted,

MICHAEL P. KENNY
*Counsel of Record*
TERESA T. BONDER
RUTH L. GREENBERG
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000
*Counsel for Respondents*